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No. 230

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1910.

AMERICAN LAND COMPANY
(a corporation),
Appellant,

vs.

LOUIS ZEISS,
Appellee.

BRIEF FOR APPELLEE.

OTTO TUM SUDEN,
Attorney for Appellee.

Filed this ..... *day of September, 1910.*

JAMES H. McKENNEY, Clerk.

By ..... *Deputy Clerk.*

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Statement of Facts.

There are some facts in this cause to which we beg leave to direct the Court's attention, in order that the questions presented on this appeal may, at the outset, be definitely and properly ascertained.

These facts are that while appellant's bill does aver that its grantors were, at the time the appellee obtained his adjudication under the "McEnerney

Act", the owners in fee simple of the land involved, and that appellee Zeiss held but a right of use and occupation for a term of years, it nevertheless appears, also, by the bill and the exhibits attached, that appellee Zeiss in his complaint claimed to be the owner in fee simple (see page 26 of the record) and that in the affidavit attached to his complaint, and required to be filed therewith by the "McEnerney Act" (see pages 29-30 of the record), he set out specifically, when, how and from whom he acquired the land, that is, by deeds of grant, bargain and sale, which under the law of the State of California, presumably confer a title in fee simple under section 1105 of the Civil Code, reading:

> "A fee simple is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a less estate was intended."

These pleadings moreover refer to the time and place of their recordation in the proper office with exactness. Thus, it is shown that since 1890 appellee has appeared on the record of the City and County of San Francisco, as the owner in fee simple of the land involved.

So that it would seem to follow that appellee's averment of a fee in himself was made in good faith, and is supported by conveyances, on their face, conveying such a title. And therefore the statement that appellee Zeiss was a "mere *tenant*", as appears in the statement of facts in appellant's brief (page 6) as follows: "In the case of *Zeiss v. All persons*

" now being considered, one who was a mere *tenant* " made affidavit that he did not know and had not " been informed of any claim to the property ad- " verse to his own claim of *ownership in fee*", is incorrect.

It is on the other hand indeed averred in the bill of complaint (paragraph III, page 5 of record) that appellee's title is derived from a grant by the Legislature of the State of California in the year 1851, granting the use and occupation of this land to the City and County of San Francisco, for a term of ninety-nine years, but this allegation we submit is *felo de se*, for the Legislature of the State of California had not then nor has it now any power to make any grant of the lands of the State, for its powers are legislative only, and not executive, the Constitution of the State of California then, as now, providing:

Article 3, section 1, Constitution of the State of California, 1849; article 3, section 1, Constitution of the State of California, 1879:

> "The powers of the government of the State of California, shall be divided into three separate departments, the Legislative, Executive and Judicial, and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except as in this Constitution expressly directed and permitted."

People v. Parks, 58 Cal. 624, at page 643.

Appellant all through its case seems to urge that because of this alleged derivation of appellee's title the latter occupied towards appellant the relation of a tenant, and urges this supposed relation as an example of the frauds which can be practised under the statute in question. But, it is respectfully submitted that under the allegations of appellant's bill it appears more than sufficiently that the relation of the landlord and tenant could not and does not in fact exist between appellant and appellee.

Attention is further directed to the fact that the appellant nowhere claims in its bill that appellee Zeiss, in the procurement of the decree establishing his title, proceeded in bad faith or made any claims thereto which he had reason to believe were not just and lawful. On the contrary, the appellant concedes that the appellee here may have proceeded in the State Court in the belief that he was asserting a right actually vested in him (appellant's brief, page 7).

Neither does complainant in its bill assert that appellee was in anywise cognizant of the alleged existence of appellant's claim of title to the land, or that such claim of title of appellant's grantors appears anywhere of record from which appellee could have learned of it.

The case presented therefore is one of a person claiming title in fee simple under proper muniments of title, duly recorded, in the actual and peaceable

possession of the land, who proceeded under the provisions of the "McEnerney Act" to have that title judicially decreed, ascertained and established as therein provided; who, in so proceeding, acted in good faith, was wholly ignorant of any adverse claimants, had no means of ascertaining any such except by means of this very proceeding, and who obtained his decree, as complainant itself avers, by a strict compliance of the provisions of the act (see page 14 of record).

It results, therefore, that inasmuch as the appellee was ignorant of any adverse claims, or the existence or name of any adverse claimant, he could not in the very nature of things, give personal notice to any such, except in the manner provided by said act.

And finally, we take exception to appellant's prophecy in the last paragraph of the statement of facts in its brief (page 11), "that the Legislature no "doubt, would pass a new Act providing for the "utilization of the mass of evidence known to exist", and we also call the Court's attention to the fact that there is no showing that "the mass of evidence" referred to by counsel does in fact exist, nor any evidence of any intention on the part of the Legislature to enact such a statute.

We deny that "in San Francisco the evidence of "titles is substantially complete"; that "abstracts "prepared with the greatest of care in the course "of business, verified and reverified, checked and "rechecked, cover the whole city".

The "mass of evidence" referred to by counsel is but fragmentary and incomplete notes gathered by the abstract and title insurance companies, and there is no assurance as to their accuracy; nor could one by spending "a very few dollars" or for any amount " discover the exact condition of his title as it ap- " peared of record before the fire".

And "an examination of the notorious sources of " information" other than the records of the title insurance and abstract companies was impossible. The data and notes gathered by these companies are by no means correct, accurate or complete, nor are these companies under obligation to any one to maintain correct records, nor to display them or alleged copies thereof to whomsoever chooses to buy them, in fact the so-called "notorious sources of information" are secret and private data, accessible only to the officers of the respective companies and to obtain an alleged copy thereof one must first pay the price.

In other words the appellant would place the property owners of the City and County of San Francisco at the mercy of the abstract and title insurance companies who have the monopoly of the said fragmentary and hearsay evidence.

All this, we submit, should have no place in the brief, but appellee is compelled to reply owing to the fact that appellant dwells upon the subject in its brief at length.

And thus, the case presented resolves itself into two ultimate questions, which are:

First. Is it competent for the State of California to establish a mode of procedure by means of which possible claims of unknown persons adverse to the actual possessors of land within its borders may be challenged for adjudication and passed upon by its Courts?

Second. Are the notices in that behalf provided for in the so-called McEnerney Act, of a nature and character to fulfill the constitutional requirements as to due process of law in regard to unknown claimants?

Both questions, it is respectfully submitted, should be answered in the affirmative.

Argument.

The Fourteenth Amendment of the Constitution of the United States is not intended to guarantee judicial action exclusively as due process of law to those amenable to the laws of a State in relation to their property rights.

The State in the exercise of its right of sovereignty over all lands lying within its borders, has the power to establish a mode of procedure by means of which the rights of all persons whether known or unknown may be ascertained and judicially established.

The State has the power to regulate the tenure of immovable property within its limits, the conditions of its ownership and the modes of establishing the same whether the owner be stranger or citizen.

In

U. S. v. Fox, 94 U. S. 315,

the Supreme Court, speaking through Mr. Justice Fields, states the law as follows:

> "It is an established principle of law everywhere recognized arising from the necessity of the case that the disposition of immovable property whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."

And

> "The title and modes of disposition of real property within the state whether inter vivos or testamentary are not matters placed under the control of the Federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interest of the state."

In

Arndt v. Griggs, 134 U. S. 317, at page 320,

the same Court said:

> "It (the state) has control over property within its limits, and the condition of ownership of real estate therein, whether the owner be stranger or citizen is subject to its rules, concerning the holding, the transfer, the liability to obligations, private or public, and the mode of establishing title thereto."

In

Hamilton v. Brown, 161 U. S. 265,

the constitutionality of a statute providing for the escheat to the State of Texas of lands of a person

dying without heir was under consideration. The statute provided for the publication of a notice "to " all persons interested to appear and show cause". The Court held that in such a case where the provisions of a statute had been followed (page 268)

> "the judgment is conclusive evidence of the state's title in the land, not only against any tenants or claimants having had actual notice by scire facias, or having appeared or pleaded but also against all other persons interested in the estate and having had constructive notice by publication",

and further (page 274):

> "But it was within the power of the Legislature of Texas to provide for determining and quieting the title to real estate within the limits of the state and within the jurisdiction of the Court, after actual notice to all known claimants and notice by publication to all other claimants."

See, also:

Lynch v. Murphy, 161 U. S. 247-251;
Roller v. Holly, 176 U. S. 398;
Bennett v. Fenton, 41 Fed. Rep. 283;
Gormley v. Clark, 134 U. S. 338;
Tyler v. Judges, etc., 175 Mass. 71.

And in that behalf the State may establish any procedure adequate for the purpose, so long as the constitutional guaranties of due process of law are not infringed upon. It may establish new remedies or alter common law remedies.

Hurtado v. California, 110 U. S. 516;
Iowa R. R. Co. v. Iowa, 160 U. S. 389;

Hagar v. Reclamation Dist., 111 U. S. 701-707;

Kennard v. Louisiana, 92 U. S. 480;

Tyler v. Court of Registration, 175 Mass. 71;

People ex rel Witherbee v. Board, 70 N. Y. 228.

As illustrating the power of the State in regard to the lands within her limits, let us consider the ordinary case of an adverse possession and the statute of limitations.

If A takes possession of B's land, and claiming ownership, continues to hold and occupy it for the period of time designated by the statute of limitations and in other respects brings himself as to this land so occupied, within its terms and provisions, B loses his right to the land, the substantial result of the operation of the statute of limitations being a change of ownership in such case, and all this without action or due process of law. Such statutes are in force and valid everywhere.

Now if it is competent for a State to enact and enforce such a statute, why cannot a State enact a law, that in any case where the public records are burned, the party in actual and peaceable possession of land, claiming ownership, may institute a proceeding in her Courts, for the purpose of having all other claimants, known or unknown, challenged to present and submit their claims for adjudication upon due and sufficient notice given in the usual mode of personal or substituted service, and giving ample time,

all circumstances considered, to all parties interested and that failing so to do, the party in possession and making satisfactory proof of ownership, will be decreed to be the owner?

If statutes of limitations find their reason in *"ut finis sit litum"*, why does not the McEnerney Act find equal support for its enactment on the same ground? See

Gormley v. Clark, 134 U. S. 338.

For the necessity of such an enactment surely is immeasurably greater in the case of the destruction of all public records, than it is in an ordinary case of adverse possession between private parties.

And if the State can say to B, claiming title to land, that unless he asserts his title against A in adverse possession within the time declared by the statute of limitations, he must forever hold his peace, then likewise it can say, as it did say to appellant's grantors, that unless they appeared and asserted their claims as against appellee, in possession and claiming ownership, whenever the latter should institute proceedings, and otherwise comply with the provisions of the McEnerney Act, they must forever hold their peace.

In the case of the statute of limitations the law is set in motion the moment adverse possession is asserted. That in itself is notice to the ousted owner. In the case of the McEnerney Act, it is set in motion by the commencement of the action and the publica-

tion and posting of summons, and recordation of a *lis pendens,* as well as actual and peaceable possession.

As illustrating the power which the State has, to deal with the title to land within her borders there would seem to exist a strict analogy between these statutes. Both rest on the power of the State to regulate land titles and their deraignment, both imply a duty upon the part of the claimant to take notice of the law of the land and to act in accordance therewith, when the protection of his interest requires such action.

Another apt example disclosing the power of the State over land may be found in the Title Registration Laws.

Under them a bona fide purchaser for value secures a good title over a prior purchaser who fails to record his deed. Prior to the enactment of the statutes, every one held his own title deeds to prove his title. Registration under these laws is not compulsory. Nevertheless he who fails to comply with their provisions, assumes the risk of losing his own by virtue of their operation. Now from the standpoint of appellant it would seem to be wholly without the power of the State to deprive an owner of his land by any such means. Having held title to his lands under properly executed deeds in accordance with immemorial law, what right has a State to require an owner to register them on the pain of

being deprived of his land in certain contingencies? Is any answer necessary?

Yet the enactment of these Registration Acts marked a much greater departure from the established modes of holding, proving and conveying titles, than does the "McEnerney Act". Like the latter act the Title Registration Laws were but an exemplification of the State's power to prescribe the conditions under which title to land within her confines shall be established and determined. Would citizen Jones holding an unrecorded deed be heard to say that under the Recording Act he has been deprived of his land without due process of law, because citizen Brown for value and without notice, obtained from Jones' grantor a conveyance to the same land, which he duly recorded? And would not the answer to Jones' plaint be that it was his duty to take note of the law and comply therewith or take the consequences?

And thus cannot the State say likewise to owners, whose alleged claims are not of record, as was appellant's, "Take heed of the provisions of the McEnerney Act and protect your rights, or take the consequences"?

But it is claimed that whatever be the procedure, it must be a judicial one, and that the proceedings created by the McEnerney Act are not judicial in their nature.

The main ground of this contention is that inasmuch as it proceeds against unknown, and therefore

unnamed owners and is not a proceeding *in rem*, these unknown owners never become parties to the action and are not bound thereby. That as to them there is no controversy, nothing to adjudicate, nothing to affect their rights under the proceedings which are *in personam* and *de re*, rather than *in rem*.

But if it was within the power of the State of Texas as held in

Hamilton v. Brown, 161 U. S. 265,

to provide for and determining and quieting title to real estate within the limits of that State and within the jurisdiction of the Court, after actual notice to all claimants, and notice by publication to all other claimants, then it is likewise competent for the State of California so to do. And obviously each and every reason, which may be advanced against the validity of the California McEnerney Act, so far as unknown claimants are concerned, can with equal force be urged against the Texas Escheat Law. And if Texas procedure against unknown claimants is in its character judicial and binding, or if no matter what its character, it was within the power of the State to create the procedure and to call upon unknown claimants to establish their demands, or be foreclosed, then it is likewise competent for the State of California so to do.

If the Procedure under the Texas Escheat Statute was a judicial one, then the proceedings under the McEnerney Act are likewise of that character.

Appellant's learned counsel have attempted to distinguish the Texas Escheat Statute case as one *sui generis,* as involving the exercise of the prerogative powers of the State to conclude persons not named, under recognized principles of law.

But the attempt begs the question, which is simply: "Is a proceeding brought under the Texas Escheat Statute, and by which all unknown claimants are bound after constructive notice by publication, a judicial proceeding or not"?

If it is, then what particular prerogative of the State, or what recognized principle of law makes it such, and denies to the proceedings under the McEnerney Act a judicial character?

We maintain therefore that the procedure is in its nature judicial. Granting the premise that the public records are substantially destroyed, and title to real estate is no longer deraignable thereby, so that possession has become the principal proof of ownership, it would seem to follow that the State, which has itself a vital interest in the subject matter, is not only competent, but in duty bound, to provide a remedy for the conditions thus existing.

The rights and interests of all owners of real property in the City and County of San Francisco, at least, were in confusion and jeopardy. Now clearly the State could not legislate who was or who was not the owner of any particular property. Neither could it by any administrative or executive

act invest any person with title to any particular land. It therefore could only do what was done, that is: establish a mode of procedure under due process of law, affording all an opportunity upon reasonable notice to establish their rights in her Courts, the tribunals established for the trial and determination of all disputes.

But says appellant, there is no dispute, there is no issue tendered. No one asserts anything against the plaintiff.

But the answer is obvious, it is the plaintiff who asserts that he is the owner of the land. That is an assertion that no one else has title and tenders an issue to all the world or any one, who chooses to controvert it.

This is all that any plaintiff may do in any action, and thus the Supreme Court of the State of California has held, in

> Title etc. Restoration Co. v. Kerrigan, 150 Cal. 289, at page 321:
>
> "that in an action to quiet title under sections 738 and 739 of the Code of Civil Procedure the absence of a finding that the defendants asserted a claim adverse to the plaintiff is immaterial. Bulwer Cons. Min. Co. vs. Standard Cons. Min. Co., 83 Cal. 589, 'Even though the defendant makes no adverse claim', says the Court, 'third persons may regard plaintiff's title as being subject to an adverse claim by the defendant, which would be a cloud upon plaintiff's title, depreciating its value, and which he would be entitled to have removed by the decree of the Court'. The action here involved may well, as

> claimed by petitioner, be regarded as a suit to remove a cloud upon titles, the Legislature having power to declare what shall form such cloud (Clark v. Smith, 13 Pet. (U. S.) 195, 10 L. Ed. 123) and having in effect declared by this statute that the destruction of public records constitutes a cloud upon titles."

It will hardly be disputed that the owner of real property deprived of all evidence of his title by the destruction of the public records, is entitled to some remedy, and that that remedy to be effective must bind not only those whose claims can be ascertained, but in particular, those whose claims are unknown, and which thus constitute a constant, if latent, danger, an *incubus* making transfer well nigh impossible.

Driven to its ultimate conclusion, appellant's argument simply is that no procedure taken against an unknown claimant can ever have any effect upon his rights. The unknown is not a party, he is not impleaded, he is not in Court, ergo, its decree affects him not. As to him it is void. It is not judicial.

And thus the State would seem to be helpless to afford a remedy and the claimants and possessors of real property within her borders must be left at the mercy of such claimants as may from time to time appear, as it suits them or as the strength of their own claims or weakness of those in possession, may stir them to action. No one can have a clear title to his property.

What, then, constitutes judicial action? Many definitions have been given of which we append but a few.

In

People v. Simon, 176 Ill. 169,

the definition given by Mr. Cooley in his Constitutional Limitations is given as comprehensive:

> "The power which adjudicates upon and protects the rights and interest of individual citizens and to that end construes and applies the law."

In

Badger v. Gilmore, 37 N. H. 457,

it is held to be "The rightful method of obtaining " in Court what is due to any one".

In

Hall v. Decker, 48 Me. 255,

an action is defined to be the lawful demand of one's rights given in the form of law.

In

People v. County, 13 How. Pr. 398,

it is said that

> "Any judicial proceeding, which, conducted to a termination, will result in a judgment, is an action".

Harris v. Phoenix Ins. Co., 35 Conn. 310,

says that

> "an action is any proceeding for the purpose of obtaining such remedy as the law allows".

Cohen v. Virginia, 6 Wheaton 264:

"In law language a suit is a prosecution of some demand in a Court of Justice."

It will be observed that in all these definitions, there is not a word that a party seeking the remedy must proceed against any particular adversary. They all deal with and specify but one party and he the one seeking the remedy. That remedy he must seek in accordance with and as provided by law. And of course there are many judicial remedies, which do not adversely affect any one, while nevertheless a boon to him who obtains it. And it goes without saying that in many respects a man in possession of property, who cannot prove his title, is just as badly off as the man whose title is disputed. Both require a remedy, and such a remedy the law should and does afford.

If the McEnerney Act gives a remedy, then the proceeding in accordance with its provisions by one coming within their terms, is an action or suit in accordance with the definition given in Harris v. Phoenix Ins. Co., *supra*. For in that proceeding the Court applies the law to such state of facts as may be shown to exist by the evidence of the plaintiff and of any other person who chooses to come in and contest plaintiff's attempt to obtain the remedy which the law has provided. If none choose to contest, it is nevertheless a judicial proceeding, for the Court still has to apply the law to the facts. It still has a judicial duty to perform. It may grant the

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remedy or deny it, as the facts may warrant. The decree may remedy the lack of a title or settle adverse claims to that title. In any case its action is judicial. Nor is the scope and exact nature of the procedure a matter of inquiry here, for the Supreme Court of the United States in

Iowa R. R. Co. v. Iowa, 160 U. S. 389,

held that

> "The fourteenth amendment to the Constitution in no way undertakes to construe the power of a State to determine by what process, legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided." (Syllabus)

See, also:

Sinking Fund cases, 99 U. S. 700;
State v. Newell, 13 Mont. 302;
Martin v. Simpkins, 20 Colo. 438;
Hoffman v. Superior Court, 151 Cal. 386;
Robinson v. Kerrigan, 151 Cal. 40;
Robbins v. Chicago, 4 Wall. 657.

We beg leave to quote from

Title and Document Rest. Co. v. Kerrigan, 150 Cal. 289, at page 320,

as to this point.

> "The action or special proceeding now in question is devised, as has been stated, for the purpose of establishing a title which is in fact good, but which is not deducible of record. That a Court of Equity may remedy such defect by a

> decree, although there is no actual controversy as to the title, was held in Sharon v. Tucker, 144 U. S. 533, the Court saying: 'The title of the complainants is not controverted by the defendants, nor is it assailed by any action for the possession of the property, and this is not a suit to put an end to any litigation of the kind. It is a suit to establish the title of the complainants as matter of record, that is, by a judicial determination of its validity—and to enjoin the assertion by the defendants of a title to the same property from the former owners, which has been lost by the adverse possession of the parties through whom the complainants claim.'"

And thus it would seem to be immaterial so far as the present attack upon the McEnerney Act is concerned, whether or not the proceedings are *in rem, in personam* or *quasi in rem,* they are judicial.

Nevertheless we respectfully submit the following from the case last cited (Title and Document Rest. Co. v. Kerrigan, 150 Cal. 289-306) as conclusive upon the subject:

> "One of the principal objections made to the act is that by the decree persons who may have an interest in the land are deprived of their property without due process of law. This contention is based upon the proposition that the proceeding created by this statute is a proceeding *in personam,* and not *in rem,* and that in personal actions a binding judgment cannot be rendered against the persons to be affected without giving them personal notice of the proceeding and an opportunity to be heard. It is conceded by the learned counsel for respondent, as it needs must be, that, if this is strictly a proceeding *in rem,* such personal notice is not required. Undoubtedly the act, so far as the

language of the legislature can have this effect, attempted and intended to create a proceeding which should have the force and effect of a proceeding *in rem*. Section 1 describes the proceeding as 'an action *in rem* against all the world'. Section 11 provides that the judgment shall be binding and conclusive upon every person who at the time of the commencement of the action had or claimed any estate, right, title or interest in or to the property.

"It is however, argued that, if the proceeding is in its essential features one in personam, the legislature cannot, by merely designating it *'in rem'* cut off the rights of persons interested, without providing as to them such notice and opportunity to be heard as are requisite to constitute due process in personal actions. That the mere title or designation which is given by the legislature to a proceeding cannot change its substantial character, or alter the rights of parties to it, is, of course, plain enough. What, then, in its essential characteristics, is a proceeding *in rem?* If, as contended by respondent, it is one 'to enforce a liability for which the res is liable, irrespective of who owns it, such a liability that the res can properly be impleaded as the respondent who is liable' (quoting the language of Loring, J., dissenting, in Tyler v. Judges of Court of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433) the action provided for by the present statute does not come within the definition. But neither do some other proceedings conceded to be strictly *in rem*, such as the probate of wills, the distribution of estates, and the special proceedings created by section 1664 of the Code of Civil Procedure, to 'ascertain and declare the rights of all persons' to an estate. Even though, viewed as a matter of historical analogy, there may have been at common law no proceeding in rem which was at all similar to the one here provided, it may

be asked why the State, in exercising its control over the ascertainment and settlement of titles to real estate within its borders, may not create a suit *in rem,* in which the Court assumes control of the land, and which has as its primary purpose the settlement of such titles as to all the world. In substance—and the constitutional requirement of due process deals with substance rather than form—the action does not differ in character from the action to determine heirship (Code Civ. Proc., Sec. 1664), which has always been regarded as a proceeding *in rem* (see In re Blythe's Estate, 110 Cal. 231, 234) and sufficient to bar the rights of all persons claiming as heirs of the decedent whether or not they are named in the complaint or personally served with summons. It may be conceded, however, that apart from an expression of Chief Justice Holmes in Tyler v. Judges, *supra,* there is no authority directly supporting the proposition that a proceeding of the kind created by this act is strictly *in rem.* And we need not enter into a further discussion of the point, since we do not consider it necessary in this case to determine whether or not the action is one strictly *in rem.*

"In any view the proceeding contemplated by the act is *quasi in rem*—that is to say, the purpose of the proceeding is not to establish an 'infinite personal liability' against any defendant—but is merely to affect the interest of the defendant in specific real property within the State which has at the outset of the proceeding been brought within the control of the Court. It is thoroughly well established that the constitutional requirement of due process is as to such actions satisfied by a substituted service of summons, at least as to known and designated defendants who cannot be found within the State. The most frequently cited authority upon the question of the power of a State to affect the interests of nonresidents by judgments rendered

upon a substituted service of summons is Pennoyer v. Neff, 95 U. S. 714. In that case the Court, speaking through Mr. Justice Field, said regarding the question of jurisdiction in cases of service by publication: 'Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. * * * It is true that in a strict sense a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property without reference to the title of individual claimants, but, in a larger and more general sense, the term is applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem* in the broad sense which we have mentioned.' Following the rules declared in Pennoyer v. Neff, it has universally been held that even in a purely personal action, where property within the State has been attached at the outset of a proceeding, the Court may by publication of summons obtain jurisdiction to the extent of subjecting the attached property to the payment of the claim in suit.

"The present proceeding has some of the characteristics of a suit to quiet title, a form of action well established as a branch of equity jurisdiction. While in the exercise of its inherent equity jurisdiction a Court of Chancery

acts only *in personam*, it is no doubt competent for the legislature, so far as the constitutional provision regarding due process of law is concerned, to confer upon Courts of equity a jurisdiction which shall, as to property situate within that State, operate upon it in some way other than by merely directing the defendants to do or refrain from doing some act concerning the property. The State has power to enact statutes under which the interests of persons in property within the State shall be affected so far as that property alone is concerned, and the action to quiet title, although originally under the old chancery practice merely a personal action against the defendant, may by statute be so extended as to permit the Court to bind the interest of the defendant in the property, even though such defendant may not have been personally served with process within the State. Arndt v. Griggs, 134 U. S. 316, was a case involving the validity of a judgment obtained against a nonresident on publication of summons under statutes of Nebraska similar to our own (Code Civ. Proc., sec. 738 *et seq.*), authorizing persons claiming title to real estate to bring actions against any person or persons claiming an adverse estate or interest therein for the purpose of determining such estate or interest and quieting the title to said real estate. The Court said: 'But it is earnestly contended that no decree in such a case rendered on service by publication only is valid or can be recognized in the Federal Courts. * * * The propositions are that an action to quiet title is a suit in equity, that equity acts upon the person, and that the person is not brought into Court by service by publication alone. While these propositions are doubtless correct as statements of the general rules respecting bills to quiet title, and proceedings in Courts of equity, they are not applicable or controlling here. The question

is not what a Court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is, what jurisdiction has a State over titles to real estate within its limits, and what jurisdiction may it give by a statute to its own Courts to determine the validity and extent of the claims of nonresidents to such real estate. If a State has no power to bring a nonresident into its Courts for any purposes by publication, it is impotent to protect the titles to real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a nonresident would remain for all time a cloud, unless such nonresident shall voluntarily come into its Courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the State. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title to real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it.' And in Perkins v. Wakeham, 86 Cal. 580, 21 Am. St. Rep. 67, this Court, in applying the same rule to a similar case, said: 'Unless the method of giving notice above prescribed (i. e., by publication under section 412, Code Civ. Proc.) is unreasonable or in conflict with some provision of the Constitution or principle of natural justice, it cannot be held invalid. In

determining the question of its validity, the nature of the action and the effect of the judgment must be considered. While it is true, as a general proposition, that an action to quiet title is an action in equity which acts upon the person, it is also true that the State has power to regulate the tenure of immovable property within its limits, the conditions of its ownership, and the modes of establishing the same, whether the owner be citizen or stranger. While a decree quieting title is not *in rem*, strictly speaking it fixes and settles the title to real estate, and to that extent certainly partakes of the nature of a judgment *in rem'*. There may be some expressions in the opinion in Hart v. Sansom, 110 U. S. 151, which, on their face, conflict with the rule as declared in the two cases just cited. In Arndt v. Griggs, however, the Court carefully explained the Sansom case, and pointed out that that case had to do with the effect of a judgment obtained on publication of summons in a purely personal action. Similarly in Lynch v. Murphy, 161 U. S. 247, 251, it was said, 'The Hart case was explained in Arndt v. Griggs, 134 U. S. 316, in which last case it was held that the duty of determining unsettled questions respecting the title to real estate was local in its nature, to be discharged in such mode as might be provided by the State in which the land was situated, where such mode did not conflict with some special inhibition of the Constitution and was not against natural justice and we held that nothing inconsistent with this doctrine was decided in Hart v. Sansom.' See, also, Roller v. Holly, 176 U. S. 398; Bennet v. Fenton (C. C.) 41 Fed. 283; Venable v. Dutch, 37 Kan. 515; Dillon v. Heller, 39 Kan. 599; McLaughlin v. McCrory, 55 Ark. 442; Harris v. Palmore, 74 Ga. 273; Lane v. Innes, 43 Minn. 137; Shepherd v. Ware, 46 Minn. 174; Lantry v. Parker, 37 Neb. 353; Sloane v. Martin, 145 N. Y. 524; Roller v. Holly, 13 Tex. Civ. App. 636."

Reduced to an ultimate proposition, the position of appellant's counsel seems to be that where there is no controversy, there is no judicial action, and where there is no judicial action there has not been due process of law.

Necessarily all cases cited in support of these propositions, were decided with reference to the specific facts involved, and such general observations as they contain are of value only in so far as they are applicable to and in harmony with these specific facts.

Whether or not such general observations and conclusions would apply to different facts, is always a question in the solution of which further application of the established rules of law is required.

Taking for instance the claim of appellant that where there is no controversy, there is no judicial action, and applying it to the ordinary case where the maker of a note is sued by the holder, is served with summons and defaults, whereupon judgment is entered, such judgment according to the general proposition advanced would not involve judicial action, there having been no controversy, and therefore there has not been had due process of law.

Is it necessary to point out that in such case, though there was no controversy, the maker of the note had his day in Court and that its action was judicial? For he had his opportunity to be heard and that is all the Constitution has guaranteed.

Furthermore, I will permit myself the suggestion that although the fourteenth amendment guarantees due process of law, it by no means follows that such guaranty can operate only through a judicial proceeding. A State being sovereign within her own borders, may establish and maintain any governmental agency, judicial, executive, or administrative, as she chooses, provided always that the persons affected by the proceedings are allowed due process of law. Thus a city council may levy assessments for local improvements upon land belonging to absent as well as resident owners, provided notice and where an opportunity to be heard has been given, such proceedings and the resultant liens and burdens laid upon the assessed property have uniformly been upheld. They do not violate the provisions of the fourteenth amendment, although they are clearly administrative and not judicial.

Whether or not, therefore, a proceeding under the "McEnerney Act" is judicial, or whether or not it be *in rem* or *quasi in rem,* would seem to me to be wholly beside the question. For although the Constitution guarantees "due process of law" it does not guarantee a judicial proceeding, except in so far, of course, as a judicial proceeding is in itself essential to constitute due process. And as to that, it is submitted that the decision of the Supreme Court of California in Title and Document Rest. Co. v. Kerrigan, 150 Cal. 289, to the effect that the proceeding in question under the organic law of the

State is a judicial one and properly maintainable in the Courts of the State under the grant of judicial power by the Constitution of the State is conclusive.

See

Iowa R. Co. v. Iowa, 160 U. S. 389;
Gormley v. Clarke, 134 U. S. 338.

And the crux of the question, whether the McEnerney Act affords due process of law, would seem to turn on this precise point.

A little reflection will show that the Courts of the land are not only engaged in deciding controversies. There is a most numerous class of actions in which none such arise and the sole purpose of which is to compel the party sued to perform his obligations and legal duties. In all such cases it depends wholly on the party sued whether there is to be an actual controversy or not accordingly as he denies or admits his obligations. For when all is said and done the determination of a controversy by a Court is but a means to an end, and that end is the remedy which the Court awards.

And we submit that whenever a Court is asked to award a remedy, and does so upon evidence adduced, and either upon actual notice or such constructive notice as the law requires, to the parties interested, that there its action is judicial.

And accordingly the decree of the Court in McEnerney Act proceedings is a judicial act.

The aim and purpose of the proceeding is to afford a remedy, the necessity of which we have never heard questioned except by the learned counsel for appellant, who in their brief make this astounding averment of fact (page 40).

> "It is well known that the abstracts of title referred to in the above-mentioned public statute, are those of the various abstract and title insurance companies in San Francisco; that the abstracts were saved from the fire, and that the records of the County Recorder's office can be substantially restored, page for page."

We desire to take an emphatic exception to this statement. The writer knows only to the contrary. The abstract companies have but fragmentary lead pencil memoranda, gathered by a lot of young women, wholly inexperienced in conveyancing, and which the companies dare not submit to public inspection. However the statement made by appellant's learned counsel has no place in a brief. It is not of a fact appearing in the record of the case, nor would we have cared to reply to it, if our silence might not be taken for assent.

Moreover it was for the legislature of the State to judge of the necessity for a remedy.

> See Laurel Hill Cemetery v. City and County of San Francisco, et al., decided by the Supreme Court of the United States, February 21, 1910, and numbered 100, October term, 1909.

And furthermore it is to be assumed that the legislature was of the opinion that as an arbiter of titles, the Superior Court, which under the law must "ascertain and determine all estates, rights, titles, "interests and claims in and to said property and "every part thereof, whether the same be legal or "equitable, vested or contingent, present or future, "or whether the same consists of mortgages or liens "of any description" is a far safer institution than an irresponsible abstract and title insurance company, carried on for private gain, interested in concealing errors and avoiding liability under its policies, keeping its memoranda in concealment, away from inspection and examination, owing no duty or service to any one except him who crosses its palm with silver, and in a position to make their records disclose whatever may be desired.

It is much to be regretted that appellant's learned counsel have gone outside of the record in this regard. We respectfully submit that any argument based upon the supposed existence of abstracts by means of which the claims of any and all persons can easily be ascertained, ought to be given no consideration.

Discussing that portion of the opinion of the Supreme Court of California in the case of

Robinson v. Kerrigan, 151 Cal. 40,

wherein that Court speaks of the power of the State to devise new remedies to meet new and unusual conditions, appellant said:

"The argument in this respect rests, therefore, on two grounds, one a bare assertion by the Court of its opinion as to an historical fact, the other an equally bare assertion of a supposed legal principle. The assertion of fact is not reinforced by any reference to authority, and no attempt is made to support the mere assertion of the supposed legal principle."

In reply we beg leave to cite from

Spreckels v. Hawaiian Com., etc. Co., 117 Cal. 381:

"Statutory changes are almost perpetual. New rights are created under which new equities arise. These make new cases in equity, of which the Courts at once take cognizance. The jurisdiction of the Courts of Equity is not thereby enlarged. Neither is it diminished when by statutory changes some rights cease to exist and certain cases which Courts of Equity once entertained can no longer arise. The grant of power is not confined to cases in equity which could exist under the law as it stood when the Constitution was adopted. It includes all cases in equity at all times."

The Constitution of California gives to the Superior Courts jurisdiction of all such special cases and proceedings as are not otherwise provided for (Sec. 5, Art. VI).

And the Court of that State many years ago said that:

"The familiar definition of a special case is that it is a case unknown to the general framework of Courts of Law or Equity".

People ex rel. v. Supervisors, 45 Cal. 679.

And since special cases unknown to the general framework of Courts of law or equity are thus recognized by the Constitution of the State of California, wherein was the Supreme Court of that State wrong, when it said in Robinson v. Kerrigan (151 Cal. 40, at page 47):

> "The refinements of civilized life and the necessity for the orderly regulation, determination and protection of human affairs and rights of property, have long required the extension of the judicial power beyond the settlement of controversies which have actually arisen, so as to include the function of providing security against disputes and claims which may arise. Hence in modern times, the power of the Courts may be, and often is, exerted to protect property and rights from possible though at the time unknown, hostile claims and pretensions, *or to merely declare a status or right, and thereby to forestall and prevent controversies which but for the judicial declaration might arise in the course of future transactions or proceedings.*"

And when it said further in the same case (page 48):

> "Whether or not this is strictly an exercise of judicial power, as originally instituted, it cannot be denied that it is a power of the class which, from time immemorial, has been committed to and exercised by the Courts. At the time the constitution was adopted this class of powers had long been usually exercised by the courts alone."

Another difficulty conjured up by appellant is that the provisions of the McEnerney Act deprive

citizens of other states from exercising the right of removal of actions thereunder from the State to the Federal Courts, and that the latter Courts are by its provisions deprived of their jurisdiction. They said on pages 117-118 of their brief:

> "But it is an entirely different matter when the question is whether A or B is the owner of property. *The determination of this question is not within the prerogative power and has not been since Magna Charta* (12 Coke's Rep. 63). That right is protected by the Constitution of the United States; and can only be divested by judicial power operating in accordance with the requirements of due process. The federal courts have jurisdiction to determine that right, and they can not be deprived of jurisdiction by any state."

But this question does not arise under the case presented in appellant's bill.

When appellee Zeiss conducted his proceedings under the McEnerney Act and obtained his decree, the title which appellant now claims, was in its grantors, then and there residents and citizens of the State of California. The decree in favor of appellee therefore is not one which deprives a citizen of another State of any alleged rights. It affected, as the record discloses, only citizens of the State of California. These afterwards conveyed to appellant, a Nevada corporation, which purchased not only the alleged title of its grantors, but also the alleged wrong done them by the McEnerney Act proceedings. Thus appellant stands before this Court in the shoes of the citizen of the State of

California and not in the character of a citizen of another State deprived of his rights to have the controversy removed to the Federal Courts. And accordingly it is not entitled to raise this question. The question presented by this record is whether or not the citizens of the State of California were deprived of property without due process of law.

We may, however, meet the argument advanced by suggesting that it begs the question.

If the rights of a citizen of another State to a parcel of land should become involved in a McEnerney Act proceeding, he unquestionably would be entitled to have such proceeding removed to and heard in the Federal Courts. But self-evidently to bring about such a removal, he would first have to appear and assert his title. Thereby he would at once become a party to the proceedings and the latter becomes an actual controversy between citizens of different states. Nor would the Federal Court, we may venture to assume, find difficulty in applying *legem situ.*

Again we submit that the Federal Constitution does not and cannot control a State in the exercise of its governmental and administrative powers nor in the character of the particular agencies through which it chooses to exert them. If its own Court of last resort has declared them not to violate the fundamental law of the State, this Court will not question that conclusion, but confine itself wholly to the inquiry whether or not *in the procedure* adopted

by the State, irrespective of the question, whether the proceeding is judicial, legislative or administrative, due regard has been paid to the provisions of the fourteenth amendment.

Norton v. Shelby, 118 U. S. 425-439;
Ridings v. Johnson, 128 U. S. 212;
Bacon v. North Western Ins. Co., 131 U. S. 258;
Iowa R. Co. v. Iowa, 160 U. S. 389.

We submit, therefore, that the State had the power to establish the mode of procedure by the McEnerney Act, as a means to determine and settle all conflicting claims to real property, as to which the public records had been destroyed by the earthquake and fire of April 18, 1906, including known as well as unknown owners and claimants, and whether residents of the State or otherwise, and further that these proceedings are judicial.

THE QUESTION OF DUE PROCESS OF LAW.

If the proceedings under the McEnerney Act are such as the State of California had power to create and establish the only other remaining question is whether or not they afford due process of law to all sought to be affected thereby and in particular to unknown owners.

In

Ex parte Wall, 107 U. S. 265, at page 290,

the Supreme Court of the United States quoted with

approval the following from Murray's Lessees v. Hoboken, 18 How. 272:

> "An exhaustive judicial inquiry into the meaning of the words 'due process of law' as found in the fifth amendment resulted in the unanimous decision of the Court that they do not necessarily imply a regular proceeding in a Court of Justice or after the manner of such Courts."

Mr. Justice Field in

Hagar v. Reclamation Dist., 111 U. S. 701,

spoke as follows:

> "It is no doubt wiser to arrive at its meaning by the gradual process of judicial inclusion and exclusion as the cases presented for decision shall require with the reasoning on which such decisions may be founded. (Davidson v. New Orleans, 96 U. S. 97-104.) It is sufficient to observe here that by 'due process' is meant one which following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by the law; it must be adopted to the end to be attained, and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought."

As was said by Justice White in

Louisville & Nat'l R. R. Co. v. Melton, No. 180, October term, 1909, and decided May 31, 1910.

> "That the 14th amendment was not intended to and does not strip the states of the power

> to exert their lawful police authority is settled, and requires no reference to authorities. And it is equally settled as the essential result of the elementary doctrine that the equal protection of the law clause does not restrain the normal exercise of the governmental power, but only abuse in the exertion of such authority, therefore that clause is not offended against simply because as a result of the exercise of the power to classify some inequality may be occasioned"

and the same decision is authority for the rule that mere inequality in the operation of a law and the fact that the critical analysis may show some imperfection, does not make a statute obnoxious to the 14th amendment.

In the case at bar we have to do with substituted service only, as to which it will not be disputed that jurisdiction may be obtained by means thereof in appropriate cases, and that in such it constitutes due process of law.

So far as a substituted instead of personal service is concerned, it is primarily for the legislature to judge of the necessity which will warrant a substituted instead of a personal service of process and of the degree and character of the proof by which this necessity is to be established. It has determined that such necessity exists under the circumstances authorizing the proceedings under the Act in question.

See

Laurel Hill Cemetery v. City and County of Francisco et al., decided by the Supreme Court of the United States, February 21st, 1910, and numbered 100, October Term, 1909.

In that case the Court said:

> "The reluctance must be redoubled when as here, the opinion of that Court confirms a specific determination concerning the same spot previously reached by that body that made the law, citing French v. Barber Asphalt Paving Co., 181 U. S. 324, page 341." And goes on further to say that "the propriety of deferring a good deal to the tribunals on the spot is not the only ground for caution."

And when therefore these circumstances are alleged and proven to exist, as they were alleged by the appellee, substituted service to persons out of reach of personal process and to unknown owners became proper.

See

Hoffman v. Superior Court, 151 Cal. 386.

As to the nature and character of this substituted service it is respectfully submitted, that the notice to unknown owners required by the statute is as full and adequate as the circumstances permit, and indeed far more efficient and likely to give notice to all persons interested than the provisions of any statute of almost all other states in cases of substituted service, for it makes use of all known means

if imparting notice, short of that of the ancient town crier. This is particularly so in this case, where appellant's grantors themselves permitted the appellee to remain in ignorance of their alleged claims to the land, and by failing to make public their alleged interest therein, invited the result of the proceeding here attacked.

For it is not the policy of the law that parties claiming to own real property should conceal their rights and titles, thereby preventing, or at least making difficult any settlement of conflicting claims, exposing innocent purchasers to loss and damage, preventing public and private improvements and hindering the authorities of the State and City in the performance of many official functions as far as the land so held is concerned. For the ownership of land within a State carries with it certain duties and obligations and it is necessarily the due of the public to know from whom performance of these duties is owing. The State has a direct and substantial interest in knowing who is the owner of lands within its borders.

In that behalf we respectfully submit the following excerpt from

Huling v. Kaw Valley R. Co., 130 U. S. 564;

> "It is therefore the duty of the owner of real estate who is a non-resident to take measures that in some way he shall be represented when his property is called into requisition, and if he fails to do this and fails to get notice by the ordinary publications, which have usually been

> required in such cases, it is his misfortune and he must abide by the consequences. Such publication is due process of law."

That case involved a question of taxation, as to which it has been contended a more drastic rule is permissible against an absent owner, but that the rule is not and should not be the same when a question of due process of law arises between private claimants.

But we submit that while that contention has the support of sound reason, yet there may be cases when as strict a rule should prevail between private claimants and that the case at bar presents one of them. For the destruction of public records of real property is a matter of as much public as private concern. It affects most materially the peace, prosperity and well being of the entire community and fully justifies the legislature of the State to devise an appropriate remedy, thereby casting upon the parties affected the duty to protect their interests as against any one who may unjustly seek to obtain the remedy so provided. For

> "Ownership of property implies two things: "First: Attention to it; and Second: a discharge of all obligations of taxation or otherwise to the State which protects it."
>
> Underwood v. Dugan, 139 U. S. 380.

> **"The world must move on and those who claim an interest in persons or things must be charged with knowledge of their status and condition and of the**

vicissitudes to which they are subject. This is the foundation of all judicial proceedings in rem."
Broderick's Will, 21 Wall. 519.

Confessedly the alleged titles of appellant's grantors were not of record, neither was their existence known to the appellee. Were appellant's grantors justified in not taking measures that in some way they would be represented when the property in question became involved in the proceedings instituted by the appellee?

Under the circumstances disclosed by the record, is not the process provided for in the McEnerney Act in the language of Justice Field "according to "the forms of law, appropriate to the case and just "to the parties"? And was it not pursued in the ordinary mode prescribed by law, adapted to the end to be obtained and gave ample opportunity to the parties to be heard, situated as they were?

Appellee had acquired a title purporting to be in fee simple by a deed of grant, bargain and sale. He was in actual and peaceable possession and entitled to have his title adjudicated and established in view of the destruction of the public records. The State, as we believe we have shown, was entitled to provide and create such a proceeding and to afford a remedy, and this remedy appellee pursued strictly in accordance with the statute (see Bill of Complaint, p. 14 of Record).

The notice required by the law to be given and which was given was:

The publication of a summons in a newspaper specially designated by the Court, published in the county wherein the land is situated, the summons containing a particular description of the land impleaded.

The filing of a notice of the pendency of the action in the office of the County Recorder of the county wherein the land is situated, which notice particularly describes the land involved, states the name of the plaintiff, and sets forth the purpose for which the action is instituted.

The entry upon a special set of map books of the fact that an action to determine the title to the particular land has been brought, stating date and place of filing of lis pendens, and the posting of a copy of the summons upon the land itself.

And finally the action can be brought only by one in the actual and peaceable possession of the land, a fact to be proven on the hearing.

All these things to be done within specifically designated periods of time, claimants being given three full calendar months to enter their appearance, with the right to come in any time within a year after decree and defend upon a showing of meritorious defense.

Hoffman v. Superior Court, 151 Cal. 387.

This, it is respectfully submitted, is all that can be done or should be required as to unknown owners or the unknown claims of unknown parties.

And in considering the sufficiency of the notice thus presented the circumstance should not be lost sight of in this connection, that all parties owning or claiming to own land within a State are presumed to known its laws affecting such lands. The grantors of appellant must be presumed to have known the provisions of the McEnerney Act. That is to say, it must be presumed that they knew that the appellee, in the actual and peaceable possession of the land under a muniment of title conferring ostensibly a fee, ignorant of their claims was in a position and was under the law entitled to institute the action, to record a *lis pendens,* to publish a summons, to post the latter upon the land, to make the proof required and so obtain a decree.

Having that presumptive knowledge, and pretending to be owners in fee of the land, it became their duty to guard their alleged rights against the adverse claim of which they must be deemed to have had notice, for the recordation of the deed under which appellee held the land was notice to the whole world of his claim. The office of the Clerk of the Court, where the action was brought, the office of the County Recorder, where the *lis pendens* was recorded and the map books kept, were at all times open to them, not only to see that no action adverse to their claims was taken, but also for the purpose of disclosing to the world their own claims. Had they practiced reasonable diligence in this behalf, they would have had full opportunity to defend and establish their rights.

The law presumes that every person knows and will protect his rights, and when it gives a reasonable opportunity to do so, and provides such notice as experience has shown to be the most likely to reach him, where a personal service is in the nature of things impossible, it cannot be claimed that such person has not been given due process of law.

The same may be said as to the posting of a copy of a summons and the publication in a newspaper in the county where the land is situated. Appellant's grantors were residents of the State of California during the time that the appellee maintained the proceedings under the McEnerney Act (see p. 16 of Record). They were subject to its laws and bound to take notice of them. They were bound to take notice of appellee's claim and bound to protect their rights if any they had. They failed to do so and it seems a fair inference from their pleading (see Bill of Complaint, p. 16 of Record), not because they did not know of the action brought by the appellee, but because they were not served with process personally and were not named in the pleadings and papers filed by the appellee.

For as we have shown the means of knowledge were open to them and it was their duty to avail themselves thereof.

> "The means of knowledge are the same thing in effect as knowledge itself."
>
> Wood v. Carpenter, 101 U. S. 135-143.

But conceded as it is that appellee was ignorant of their claims, therefore ignorant of their identity, and that ignorance the result of their own failure to protect their alleged rights, upon what can they and do they base their demand of personal service? Do they mean to say that the appellee should have impleaded every living person by name? For that is what it would come to if their contention is sound.

True to all of the foregoing the answer suggests itself that this reasoning moves in a circle. That if the McEnerney Act is unconstitutional in its provisions, no one need to take notice of its provisions, that it is in fact not a statute.

But in reply we beg leave to submit that when the question of the constitutionality of a statute depends upon whether or not it affords due process of law to the parties affected thereby, the passage of the statute itself and its publication as such is a step towards "due notice" in so far as it establishes the manner how, the circumstances under which, where and to whom notice is to be given.

As we have seen the act is in itself the law's determination that a substituted service is proper, and it directs all persons interested where to look. And if the circumstances assigned as the reason for allowing substituted service are such that in the nature of things personal service is impossible, and the manner, the places and the time of the substituted service are reasonable, calculated to afford the persons to be affected full opportunity to inform

themselves and to become aware of the proceeding, they would seem to afford all the protection which the Constitution guarantees. If that be not so, the State would seem to be helpless as against any one, who does not choose to put his claims and titles of record, who claim as unknown owners, as were appellant's grantors. It could not afford relief to any one holding openly and adversely, ready to perform all the duties and obligations which the ownership of land involves. For such a one could never obtain due process of law against the unknown. We cannot do better than again quote from the opinion of Sloss, J., in Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289-312, upon this very point:

> "The principal contention upon this question of due process is that the act is unconstitutional, in that it seeks to bar by the decree the rights of unknown owners, that is, those who are not alleged in the complaint or the affidavit to claim any interest in the property, and who cannot have any notice of the fact that their rights are involved other than the general notice given by the posting and the publication. If by a substituted service of any sort a court may be given power to adjudicate the rights of unknown claimants in a proceeding of this character, it seems plain that the notice to such claimants here provided is sufficient. All substituted service must rest upon the ground of necessity, and, where it is permissible at all, it must be such as would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested. Where, as here, the summons describing the nature of the action, the property involved, the name of the plaintiff, and the relief

sought is posted upon the property, and is published in a newspaper for two months, and a *'lis pendens'* containing the same particulars is recorded in the recorder's office and entered upon the recorder's map of the property, we cannot doubt that, so far as concerns the possible claimants who are not known to the plaintiff, the notice prescribed by the act is as complete and full as, from the nature of the case, could reasonably be expected.

"Indeed, the learned counsel for respondent, while they make some criticism upon details of the act regarding the notice, take their stand upon a broader proposition, and contend that in a proceeding which is not strictly *in rem* it is not within the power of the legislature to authorize on any form of process a decree which shall by its own force cut off the rights of persons not named or made parties to the proceeding. It is claimed that under the constitutions in force in American jurisdictions, the rights of unnamed persons who may claim an interest in real estate cannot be cut off by any judicial proceeding, except by one which makes the adjudication against them final only upon their failure to come in and assert their rights within a specified time after the judgment or decree. In such proceeding the decree does not operate *ex proprio vigore*, but becomes the starting point of a statutory period of limitation, and the right is extinguished by failure to assert it within this period. In a way, the procedure thus outlined is analogous to the common-law fine, but because such method of accomplishing the result may have been the only one known to the common law it does not follow that other methods may not be devised by the legislature without exceeding the limits of due process of law. No doubt the forms of procedure in common use at the time the constitutions were adopted must

be taken to have been understood by the framers as embraced within the terms 'due process of law'. But in prohibiting the taking of life, liberty or property without due process of law those who adopted these constitutions did not intend to provide that the details of practice and procedure then existing should forever remain unchanged. The legislature may provide entirely novel and unprecedented methods of procedure, provided that they afford the parties affected the substantial securities against arbitrary and unjust spoliation which are embraced within the system of jurisprudence prevailing throughout the land. 'It follows', says the Supreme Court of the United States in Hurtado v. California, 110 U. S. 516; 4 Sup. Ct. 111; 28 L. Ed. 232, 'that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be in due process of law'. It is not, therefore, a sufficient objection to the action created by this statute to say that no precisely similar proceeding was known to common law.

"Applying the principles which have led the courts in cases like Arndt v. Griggs, 134 U. S. 316 [10 Sup. Ct. 557] and Perkins v. Wakeham, 86 Cal. 580 [21 Am. St. Rep. 67, 25 Pac. 51], to sustain judgments quieting title against non-residents upon substituted service, why should not the legislature have power to give similar effect to such judgments against unknown claimants where notice is reasonably full and complete? The validity of such judgments against known residents is based upon the grounds that the state has the power to provide for the determination of titles to real estate within its borders, and that, as

> against non-resident defendants or others who cannot be served in the state, a substituted service is permissible, as being the only service possible. These grounds apply with equal force to unknown claimants. The power of the state as to titles should not be limited to settling them as against persons named. In order to exercise this power to its fullest extent, it is necessary that it should be made to operate on all interests, known and unknown. As was said by Holmes, C. J., in Tyler v. Judges of the Court of Registration, 175 Mass. 71 [55 N. E. 812]; 51 L. R. A. 433, in speaking of a statute which in the particular under discussion was similar to ours: 'If it does not satisfy the constitution, a judicial proceeding to clear titles against all the world is hardly possible; for the very meaning of such a proceeding is to get rid of unknown as well as known claimants,—indeed, certainly against the unknown may be said to be its chief end,—and unknown claimants cannot be dealt with by personal service upon the claimant."

We therefore respectfully submit that the McEnerney Act does provide due process of law to unknown owners.

Appellant questions the efficacy of the posting of a copy of the summons on the land. It claims that it does not constitute notice in a case like the present, where the party posting is the "tenant" and the party whom the notice is to reach the "landlord".

Appellant said (page 165):

> "In the proceeding, the decree in which is said to bind us, the petitioner was and is still our tenant, whose duty it was and is to hold possession of our land until the year 1950 in sub-

> ordination to our fee. We were entitled to assume that he would not be guilty of so monstrous a breach of trust as he is convicted of by the present case. If, through no fault or neglect of ours (and the present case shows that there was none) he is permitted by the Act of the Legislature of California to 'acquire' our title for his own private use and without compensation, then will be permitted that which, we believe, has *never* before been permitted in any civilized country."

But the same result may ensue in any case of substituted service, be it in *rem* or *quasi in rem*. The suitor in such case may, of course, stand in any relation of trust to the owner of the property involved, but the judgment therein would not by reason of that fact be void, because of lack of due process of law. It presents nothing more than an abuse of the process of law, for which there is an ample remedy.

The further answer is that appellee was not a tenant of appellant's grantors at any time. Appellee, as the record shows, acquired whatever right he had in the years 1889-90 by deeds of grant, bargain and sale, conveying ostensibly a fee. Such a conveyance sets the statute of limitations running and forms a basis of a perfect title under Sec. 322, Code of Civil Procedure, State of California. Appellant has not averred that appellee ever attorned to its grantors, but on the contrary has specifically averred in its bill (page 7 of record) that its grantors never were in possession or entitled to possession.

If appellant's grantors never were in possession or entitled to possession, the appellee of course, could not have been in possession as their tenant. For the possession of the tenant is that of the landlord.

See

Landers v. Bolton, 26 Cal. 393;
Mecham v. McKay, 37 Cal. 154;
Raynor v. Drew, 72 Cal. 307.

Besides appellant in his pleading shows conclusively that his assertion that appellee was his tenant, is based upon the erroneous assumption that appellee holds only the ninety-nine year right of possession alleged to have been granted by the legislature of the State of California in 1851 (see pages 5, 6 and 7 of record), a legal impossibility, since the legislature could not possibly make such a grant under the provisions of California's Constitution (see page 3, ante).

The fair inference from appellant's pleading therefore is that appellee was in adverse possession. No other conclusion can be drawn from the averments of the bill.

Appellant's argument and reasoning based upon the supposed relation of landlord and tenant do, therefore, not apply.

On the other hand this feature of the case but emphasizes the fact that it was the duty of appellant's grantors to take notice of appellee's proceed-

ings under the act. It emphasizes the fact that the posting of a copy of the summons on the land under such circumstances was as likely to reach the claimants as any other notice. For evidently they knew the character of appellee's holding and occupation and the state of their own title.

Various other grounds have been advanced in support of the claim that the statute is unconstitutional.

But inasmuch as these grounds of invalidity are based upon an alleged violation of the Constitution of the State of California, it is submitted that further contention in that behalf is foreclosed by the decision of the Supreme Court of that State passing upon the points so advanced.

These decisions are:

Title and Document Res. Co. v. Kerrigan, 150 Cal. 289;

Hoffman v. Superior Court, 151 Cal. 386;

Robinson v. Kerrigan, 151 Cal. 40.

The rule is laid down by the Supreme Court of the United States in

Gormley v. Clark, 134 U. S. 338, 348,

as follows:

> "Upon the construction of the constitution and laws of a state, this Court as a general rule follows the decision of her higher Court unless they conflict with or impair the efficiency of some provision of the federal constitution or of some Federal Statute, or a rule of general commercial law (Norton v. Shelley County, 118 U. S. 425-439) and this is so where a course of

> decisions whether founded upon statutes or not, has become rules of property within a State, also in regard to rules of evidence in actions at law, and also in reference to the common law of the State, and its laws and customs of a local character when established by repeated decisions. (Burgess v. Seligman, 107 U. S. 20; Bucher v. Cheshire R. Co., 125 U. S. 555.) Substantially conclusive effect is given to such decisions upon the construction of the State statutes, as affecting title to real estate within the State. Piddings v. Johnson, 128 U. S. 212; Bacon v. Northwestern Ins. Co., 131 U. S. 258; Hanrich v. Patrick, 119 U. S. 169)."

And in

Iowa R. Co. v. Iowa, 160 U. S. 389,

the same Court laid down the rule as follows:

> "Whether the Court of the last resort of the State of Iowa properly construed its own constitution and laws in determining that summary process under those laws was applicable to the matter which it adjudged, was purely a decision of a question of State law binding upon this Court."

Finally, we venture to suggest that this Court do not overlook the familiar rule, that he who asserts the unconstitutionality of a statute must show it to be so beyond a reasonable doubt.

Mr. Chief Justice Shaw, speaking for the Supreme Court of the State of Massachusetts in the case of Wellington et al v. Petitioners, 16 Pick. 87, says:

> "When called upon to pronounce the invalidity of an act of legislation passed with all the

> forms and solemnities requisite to give it the force of law, courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt."

Mr. Chief Justice Peck, speaking for the Supreme Court of the State of Alabama in the case of Falconer v. Robinson, 46 Ala. 340, says, at page 346:

> "In considering the question of the constitutionality of an act of the legislature, the presumption is in favor of the validity of the act, and it is not to be declared void upon a mere conflict of interpretation between the legislative and the judicial power. Before proceeding to annul by judicial sentence what has been enacted by the law-making power, it should clearly appear that the act cannot be supported by any reasonable intendment or allowable presumption. Cooley's Con. Lim. 105; People v. Supervisors of Orange, 17 N. Y. 241. The rule is that in the exposition of a statute it is the duty of the Court to seek to ascertain and carry out the intention of the legislature in its enactment, and to give full effect to such intention; and they are bound so to construe the statute, if practicable, as to give it force and validity, rather than to avoid it and render it nugatory. Clarke v. Rochester, 24 Barb. (N. Y.) 471; Cooley 186. If, after a careful examination, there is a reasonable doubt in the mind of the court, it is its duty to hold the statute to be constitutional. Cooley 182, and notes 2 and 3."

Chief Justice Brickell, of the same Court, in the case of State ex rel., etc. v. Rogers et al., found in 107 Ala. 444, 19 South. 909; 32 L. R. A. 520, says:

> "The presumption is that the legislature has not exceeded its powers, and, unless it be clear that there has been a substantial departure from the Constitution, the validity of the legislative act must be supported."

It is therefore respectfully submitted that the decree of the Circuit Court should be affirmed.

OTTO TUM SUDEN,
Attorney for Appellee.